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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1375

K. K. IRVING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–40) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1971. The petition for a writ of certiorari was filed on February 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court improperly induced petitioner's plea of nolo contendere.

2. Whether the trial court improperly considered certain evidence for the purpose of sentencing.

3. Whether conviction on six counts of violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), supported consecutive sentences on two of the counts (and a concurrent sentence on the remainder) where the fraudulent conduct charged in the consecutive counts was substantially different.

4. Whether selection of a substantial part of the grand jury list from names supplied by persons in the various communities comprising the judicial district rendered the grand jury selection process unconstitutional.

STATUTE INVOLVED

Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

STATEMENT

In an indictment returned in the Southern District of Indiana petitioner and others were charged with fraud in the offer or sale of securities in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a). (App. 36–75).[1]

Securities of Air and Space Underwriters Inc. (ASU), were offered in order to obtain financing to take over the assets of the Umbaugh Aircraft Corporation, which since 1962 had been the subject of an involuntary bankruptcy proceeding in Florida under Chapter X of the Bankruptcy Act. The indictment alleged that the defendants had manipulated the price of this stock on the over-the-counter market, misrepresented material facts, and concealed other material facts.

After petitioner's challenge to the array of the grand jury (App. 102–104) had been overruled, he pleaded nolo contendere to 21 counts of the indictment on the opening day of trial (App. 487). Before accepting the plea, the judge explained the nature and consequences of the plea (App. 488–489) and noted that "since each count is a separate offense" petitioner could theoretically be sentenced to imprisonment for 105 years (App. 488). Petitioner assured the court that he had not been promised anything for his plea and that no one had represented the effect of the plea on the judge when it came time to pro-

[1] "App." refers to the Appendix in the court of appeals.

nounce sentence (App. 491). The judge specifically stated that he did not engage in plea bargaining and that no one had authority to speak for him (App. 492).

The judge then stated that he would make no finding at that time since it was necessary for him to find the corpus delecti, which, as he earlier explained, was some evidence that a crime had been committed by petitioner (App. 489–490). Government counsel pointed out that evidence of misrepresentation by petitioner and another defendant, as well as portions of statements they had made to the S.E.C. linking them to the scheme, had been introduced in a civil injunction suit at which the judge had presided (App. 492–493). The judge indicated that he remembered little about the injunction proceedings but saw no reason why the testimony before the S.E.C. should not be considered (App. 493). Petitioner's counsel stated that he understood that the evidence in the case to be tried would be considered for the purpose of establishing a factual basis for the plea (App. 493), but agreed that the court could consider the statements to the S.E.C. (App. 494). Defense counsel also suggested that if government counsel thought those statements adequate, consideration of the evidence at the upcoming trial would not be necessary (App. 494). Government counsel replied that "the statements of [petitioner and a codefendant who pleaded nolo contendere at the same time][2] could be considered as to their

[2] A co-defendent Nash entered a nolo plea at the same time.

connection with the corpus delicti" (App. 494). The matter was adjourned for a pre-sentence report (App. 492, 495).

Petitioner came before the court for sentencing at the same time as others who had been convicted after trial. The court adjudged petitioner guilty on six of the twenty-one counts to which he had pleaded nolo. The court observed that petitioner, as president of ASU, was the "number 1" defendant (App. 561). Petitioner was sentenced to five years imprisonment on count 10 and a consecutive term of 2 years on count 12, with 2 years on each of the remaining counts (App. 14, 19–21) to run concurrently with the sentence on count 12.

Before imposing sentence the court specifically noted and read to petitioner testimony before the bankruptcy court in Florida to the effect that petitioner had assets of a million dollars and his attorney's statement that a public offering of stock was not contemplated (App. 521, 530–531). The court also noted that petitioner, although he clearly held valuable land, had told the probation officer that he was now "worth nothing" (App. 523–524). The court had before it a report prepared by a government accountant indicating that petitioner had actually made a small profit on the venture, but the court itself noted an error in that report (App. 529). In sentencing the defendant, the court said it was assuming that petitioner had lost $150,000 in the venture (App. 561).

Petitioner subsequently moved to withdraw his plea of nolo contendere on the basis that the court had erroneously referred to testimony in the trial of peti-

tioner's co-defendants in fixing sentence and had improperly considered an accounting report (App. 330-333). The court denied the motion (App. 345–346), pointing out that it had itself caught the accounting error. The court again emphasized petitioner's misleading statements to the Florida bankruptcy court (App. 345).

On appeal, petitioner renewed his challenge to the grand jury, claimed that his plea of nolo contendere should have been set aside, and argued that consecutive sentences could not be imposed because the various counts arose out of a single scheme. The court of appeals affirmed the conviction and sentence (Pet. App. 34–36; see also Pet. App. 3–6).

ARGUMENT

1. Petitioner entered his plea of nolo contendere with the assistance of counsel on the day the case was scheduled to go to trial. In the courts below petitioner never suggested, as he now does before this Court, that his plea was induced by a promise of leniency. Only in extraordinary circumstances will this Court consider questions not raised below. *Lawn* v. *United States,* 355 U.S. 339, 362 n.16; *Husty* v. *United States,* 282 U.S. 694, 701, 702. No extraordinary circumstances are present here.

In any event, the record clearly shows that the trial court offered no inducement whatever to petitioner in exchange for his plea. The remarks of the court and the prosecuting attorney quoted by petitioner (Pet. 8–9) reveal no promise of leniency. The court in no way indicated what sentence petitioner would receive,

and the prosecuting attorney stated only that the government "would not make any recommendation" on sentencing.

2. With respect to the sentence itself the trial judge manifestly had authority to consider any pertinent information, including that brought out at the trial. Apart from the report of a government accountant, on which the court did not rely, the information considered by the court in sentencing petitioner consisted of the pre-sentence report, the evidence at trial and other matters of public record. There is nothing to petitioner's claim (Pet. 12–13) that the court promised not to consider trial testimony. The discussion about the evidence the trial court would consider occurred after the plea of nolo contendere was accepted and related only to the court's finding of what it called the corpus delicti (App. 493–494). There was no discussion of what would be considered in fixing sentence.

3. Contrary to petitioner's assertion (Pet. 17–19), the court of appeals did not hold, by indirection or otherwise, that each mailing in connection with a specific fraudulent scheme to sell securities in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), necessarily constitutes a separate indictable offense. First, the court noted that there were Section 17(a) counts of the indictment that "charged not only separate mailings, but separate sales * * *" and that these would constitute separate receipts of "money or property" within the meaning of Section 17(a)(2).[3] (Pet. App. 11a.) Second, the court found it

[3] While one count for which petitioner was sentenced, count 12, did not specifically allege a sale, the four other counts upon

unnecessary even to reach the question whether each such sale by use of the mails would constitute a separate offense where there appeared to be a single fraudulent scheme. As the court pointed out, during the period covering the counts on which petitioner was sentenced, "[t]he content of the fraud did not remain static. * * * [T]he scheme to defraud involved in the various counts was sufficiently different as time went on * * * that the use of the scheme in each of the respective counts could fairly be deemed a distinct offense with cumulative penalties" (Pet. App. 19a).[4]

Thus, count 10, on which petitioner received the five year sentence, was based on a sale on July 3, 1964. By then petitioner had participated in numerous material misrepresentations, omissions and other fraudulent conduct, sufficient in and of themselves to constitute a "scheme" within the meaning of Section 17(a). Count 12, the basis for the consecutive sentence, involved the issuance by petitioner on August 14, 1964,

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which the sentence was to run concurrently with count 12 each did involve a sale. In this setting, contentions raised to the counts on which concurrent tences were ordered need not be considered since such a rev ew would "have no appreciable impact on the rights of any party." *Benton* v. *Maryland*, 395 U.S. 784, 792; see *Lawn* v. *United States*, 355 U.S. 339, 359, 362; *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Sinclair* v. *United States*, 279 U.S. 263, 299.

[4] The court's statement was made with respect to Amick, who was petitioner's partner in a dealership under Umbaugh, the two being "moving forces in the organization of ASU" (Pet. App. 18a). Of the six counts on which petitioner was sentenced and the eight counts on which Amick was sentenced, four counts were common: counts 10, 12, 14, and 20, which represented sales and other conduct involving use of the mails between July 3, 1964, and October 21, 1964.

of a fraudulent letter and press release relating to an agreement with a Canadian company. This was clearly an additional fraudulent scheme beyond the initial plan. Subsequent to this and leading to the sales from mid-October to early November 1964 referred to in counts 19, 20 and 21, petitioner concurred in the mailing to existing shareholders (in preparation for a stock rights offering) of deceptive photographs and reprints of a misleading magazine article. Hence there were not only different sales but separate fraudulent additions to the initial fraudulent scheme.

4. Petitioner challenges (Pet. 20–23) the "suggester" or "key man" system, whereby a substantial number [5] of the more than 1200 names [6] appearing on the grand jury list had been supplied by persons selected for this purpose by the district court clerk or the jury commissioner. The "suggesters" were chosen on the basis of "wid[e] acquaint[ance] with persons of diverse background" and the likelihood that they would "suggest jurors representing a fair cross-section of [their] communities" (R. 635); they "included * * * county assessors, county clerks, postmasters, presidents and secretaries of community and civic clubs, high school superintendants and principals and labor leaders" (R. 635–36). About 140 of these persons recommended potential jurors during 1964–1966 (Pet. App. 5a) in response to a form letter

[5] The suggester system was the principal means of obtaining names of potential jurors; additional sources were city telephone directories and names supplied directly by the jury commissioner (R. 635–36).

[6] At least 300 names were chosen from each of the four divisions making up the Southern District of Indiana (R. 635).

from the jury commissioner and clerk of the district court, which stated that jurors should be "capable and impartial and * * * selected without regard to race, color, creed, politics or station of life * * * and should represent all walks of life and points of view" (Ex. A 1 following R. 638). Attention was called to 28 U.S.C. 1861 and 1862, which were set forth on an attached sheet (Ex. A 2 following R. 638). The constitutionality of this method of venire selection has been consistently upheld,[7] although at times in its specific operation the system may have been subject to abuse.[8]

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[7] *Scales* v. *United States*, 367 U.S. 203, 259, affirming on this point, 260 F. 2d 21, 45 (C.A. 4); *United States* v. *Butera*, 420 F. 2d 564, 573 (C.A. 1); *United States* v. *Di Tommaso*, 405 F. 2d 385, 391 (C.A. 4), certiorari denied, 394 U.S. 934; *Sanders* v. *United States*, 415 F. 2d 621, 623–624 (C.A. 5), certiorari denied, 397 U.S. 976; *United States* v. *Hoffa*, 349 F. 2d 20, 29–31 (C.A. 6), certiorari granted on another issue, 382 U.S. 1024, affirmed, 385 U.S. 293; *United States* v. *Brickey*, 426 F. 2d 680, 683 (C.A. 8), certiorari denied, 400 U.S. 828; *Pope* v. *United States*, 372 F. 2d 710, 723 (C.A. 8) (*en banc*), vacated on other grounds, 392 U.S. 651; *Windom* v. *United States*, 260 F. 2d 384, 385 (C.A. 10).

[8] Thus *Witcher* v. *Peyton*, 405 F. 2d 725, 726–730 (C.A. 4), and *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5), cited by petitioner, upheld challenges to jury lists on which black citizens were grossly underrepresented, but those cases did not challenge the principle of "suggester" or "key man" venire selection. *Witcher*, *supra*, at 728; *Rabinowitz*, *supra* at 51; see *Mobley* v. *United States*, 379 F. 2d 768, 773 (C.A. 5). Nor did the Judicial Conference "condemn" the "key man" system as petitioner erroneously states (Pet. 21). The Conference merely pointed out that the "system allows opportunities for discrimination." *Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States*, 42 F.R.D. 353, 360 (1967).

The enactment subsequent to the trial in this case of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861–1871, which establishes essentially a system of random jury selection, in no way reflects upon the constitutionality of the "suggester" system. *United States* v. *Cohen,* 275 F. Supp. 724, 739 (D. Md.), affirmed *sub nom. United States* v. *Di Tommaso,* 405 F. 2d 385, 387–392, certiorari denied, 394 U.S. 934. Indeed, the "fundamental defect" sought to be cured by enactment of the statute was the lack of "sufficient guidance," see *e.g., Pope* v. *United States, supra,* 372 F. 2d at 722–723, in existing laws. Hart, *The Case for Federal Jury Reform,* 53 A.B.A.J. 129 (1967); see *Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States,* 42 F.R.D. 353, 363 (1967).

Petitioner joined in a pre-trial motion challenging the array of the grand jury. This was supported by affidavits summarizing interviews with 79 of the "suggesters" (R. 649 *et seq.*). These same affidavits had been introduced in *United States* v. *Duke,* 263 F. Supp. 828 (S.D. Ind.), and another case then pending in the same court.[9] After consideration of these affidavits, the court below noted that (Pet. App. 5a-6a),

> "several key men * * * had not suggested names of persons belonging to particular groups or classes. Some of the reasons [given] * * * would tend to establish invalidity if such reason were found to have guided most or a substantial group of key men, but we deem the degree to

[9] *United States* v. *Townsend,* IP 66-Cr-61.

which these reasons operated among the total number interviewed was clearly insubstantial.[10]

As this Court has said in a related context, the Constitution requires no more than that the "source of jury lists * * * reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty." *Brown* v. *Allen,* 344 U.S. 443, 474; see *Swain* v. *Alabama,* 380 U.S. 202, 208–209. Petitioner clearly failed to make a showing of systematic discrimination by the "suggesters" sufficient to entitle him to a hearing on the question.[11]

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[10] Moreover, the Government's verified answer to the petitioner's subsequent motion challenging the array of the petit jury contains a comparative statistical analysis in detail of the 124 persons summoned for potential service as petit jurors in the instant case, which demonstrated conclusively that the characteristics of the petit jurors did not vary significantly from those of the statewide population (RS 425–835 and Ex. A thereto). Cf. *United States* v. *Duke, supra,* 832–835.

[11] Courts "will not presume that the key persons did not follow instructions to recommend persons who are fairly representative of the whole population of their communities. Surely, some showing of a disposition to discriminate is prerequisite to a searching investigation." *Windom* v. *United States, supra,* 260 F. 2d at 385. Otherwise, "the trial of a criminal case could be diverted by unsupported charges. Court officials, jurors, suggesters, and other persons could be subjected to lengthy and needless inquisitions which in the future might deter them from rendering effective service to the courts." *United States* v. *Hoffa, supra,* 349 F. 2d at 30. Cf. *Whitus* v. *Georgia,* 385 U.S. 545, 550; *Frazier* v. *United States,* 335 U.S. 497, 503–504; *Tarrance* v. *Florida,* 188 U.S. 519, 520.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

WILLIAM M. HEGAN,
Special Counsel.

JAMES J. SEXTON,
Attorney.

Securities and Exchange Commission.

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